

## **REMARKS**

This paper is submitted in response to the Office Action mailed November 22, 2005. The Applicant respectfully requests that the following Remarks be entered into the official file pertaining to the subject application.

Applicant acknowledges the indicated allowability of Claims 3-5, 7 and 16.

Please cancel Claims 2, 6, 13 and 15 without prejudice.

Claims 3, 7 and 16 have been rewritten in independent form without amendment to include all the elements of the base claim and any intervening claims.

Claim 14 has been amended to reflect a corrected dependency.

Applicant submits that Claims 3-5, 7, 14 and 16 are in condition for allowance and such action is requested.

The present application has been pending for over six years due to the piecemeal examination this application has received. The Applicant has met with the examiner several times and has met with the examiner's supervisor in an attempt to clarify the applicant's position, but has been stymied by the examiner's refusal to fairly address the applicant's arguments and has refused to acknowledge, or understand, binding case law. Each of the pending rejections is without merit, as detailed in the trail of applicant's responses to the previous office actions. Applicant begrudgingly places the application in condition for allowance because further dialogue with the examiner on the pending issues is sure to be futile based on the examiner's inability or refusal to follow the logic of the arguments presented. Applicant expressly reserves the right to file any claims cancelled

during this prosecution in a continuing application.

### **The Prosecution of the Subject Application has been Horrendous**

The prosecution of the subject application has been piecemeal, inconsistent and contrary to established principles of patent law. For example, the examiner has repeatedly mischaracterized the cited references and has refused to acknowledge the Applicant's arguments rebutting such mischaracterizations. In the Office Action mailed 3/24/04, (almost two years ago) the Examiner took a position that the scaling parameter defined in Claim 13 was not disclosed in Fabre, but was rather inherent in the selection of opportunities. (See Office Action mailed 3/24/04, page 17). In response thereto, the Applicant explained that the legal doctrine of inherency meant that a non-disclosed feature must be necessarily present, and rebutted the Examiner's inherency assertion, citing to Column 5 of Fabre stating, "when the selected opportunity does not enable a plan to be constructed which satisfies all the constraints, the algorithm returns to step 1 to select an opportunity." (See Fabre, Column 5, lines 42-45). The selection of opportunities does not necessarily weight and thus Fabre does not inherently disclose weighting. However, in the next Action **and without addressing Applicant's argument above**, the Examiner changed his basis for the rejection of Claim 13 and stated that Fabre disclosed "taking the requests in order and giving each request as many opportunities in the initial plan as are required to saturate the request, wherein the saturation level is equivalent to a weighting level" (See Office Action mailed 10/4/04, page 16) in

contradiction to his earlier statement. Thus, the Applicant is at a loss with regard to responding to the Examiner's "new" and circular argument in the present Action that Fabre discloses "selecting the opportunities in the order determined by the classification (scaling parameter)." (See Office Action mailed 11/22/05, page 5, lines 14-15).

By way of further example, responsive to the Action mailed 3/24/04, the Applicant rebutted the § 103 rejection of Claims 2-7 and stated that while the cited reference, Matheson, discloses different parameters for consideration in scheduling trains, such a disclosure does not make obvious the many different relationships between the parameters which may be utilized to evaluate a schedule. In the present application, the Applicant has identified specific relationships between the parameters, which when utilized, result in an improved schedule optimized to such specific relationships and provided actual test results in support. None of these relationships between the parameters are disclosed, taught or suggested in either Matheson or Fabre. In contrast, the Examiner made an improper blanket statement that "Applicant's claim limitations...which determine the relationship between total trip time and total slack time and the optimum values thereof, seem to be completely within what one of ordinary skill in the art would consider obvious" (See Office Action mailed 10/4/04, page 15, lines 6-17) and provided no evidence in the cited references to support such a bald statement.

Further in rejection the specific claimed ranges of the parameters as an obvious choice of one skilled in the art, the examiner ignored the correct application of the case law that a particular parameter must first be recognized as a result-effective variable in

the prior art before the examiner can assert that a claimed optimum value of the result-effective variable is obvious over the cited references. See MPEP 2144.05(II)(B). Thus, the Examiner either does not understand the proper application of the case law or is unwilling to properly apply the case law.

In yet another example, the examiner has repeatedly ignored the explicit language in the cited references and has repeatedly refused to acknowledge the Applicant's arguments rebutting § 103 rejections based thereon. In the present Action and each of the Actions mailed 10/4/04, 3/24/04, 9/23/03, 3/11/03, the Examiner took the improper position that Matheson discloses determining total slack time and referenced Column 26, lines 16-19 of Matheson in support thereof. This cited portion of Matheson states:

The slack time percent provides a limited amount of cushion with which the movement planner can move the train trips to assure meeting the overall schedule.

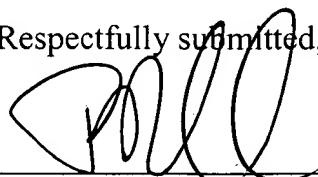
See Matheson, Column 26, lines 16-19. In contrast, "slack time," as defined in the instant application at page 54, third paragraph, is the accumulation for all orders of the differences for each trip between maximum trip time based on the scheduling window and the minimum trip time based on maximum throttle. Thus, by the explicit language in Matheson, the language in the instant application, and as provided to and ignored by the Examiner, "slack time percent" is a different concept than the "slack time" as claimed. Unfortunately, the Examiner has repeatedly ignored such clear and explicit distinctions in the art and ignored arguments attempting to spell out such distinctions.

And yet in another example, the examiner repeatedly maintained § 101 rejections

without any legal precedent. In the Actions mailed 9/23/03, 3/24/04 and 10/4/04, the Examiner rejected all claims under § 101 as directed to non-statutory subject matter because the claims do “not involve, use, or advance technological arts (e.g., processor, computer, electronic computing device) since the steps could be performed using pencil and paper.” (See Office Action mailed 3/24/04, page 3). Such an argument is directly contrary to binding legal precedent, and was ignored by the examiner and his supervisor on the basis that the PTO was pursuing a new policy. Ironically, the examiner withdrew the Section 101 rejections after two years finally recognizing that there was no proper legal basis for the rejection. Such use by the examiner as a test case for the PTO’s “new policy” that is directly contrary to established legal precedent is particularly disturbing..

While one recourse may be to press forward and continue the present arguments the applicant can not bear the further delay caused by this piecemeal and disjointed prosecution. Thus, to ensure that no further delay is suffered, the Applicant has placed the pending claims in condition for allowance. Allowance of Claims 3-5, 7, 14 and 16 is requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. McPherson', written over a horizontal line.

Patrick D. McPherson  
Reg. No. 46,255

DUANE MORRIS LLP

1667 K Street, N.W., Suite 700  
Washington, DC 20006  
Telephone: (202) 776-7800  
Telecopier: (202) 776-7801

Dated: February 22, 2006